

Fordham Law Review

Volume 67 | Issue 2

Article 7

1998

The Impact of Antitrust Law on the Legal Profession

Thomas D. Morgan

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>

 Part of the [Law Commons](#)

Recommended Citation

Thomas D. Morgan, *The Impact of Antitrust Law on the Legal Profession*, 67 Fordham L. Rev. 415 (1998).
Available at: <https://ir.lawnet.fordham.edu/flr/vol67/iss2/7>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

The Impact of Antitrust Law on the Legal Profession

Cover Page Footnote

Rex E. Lee Professor of Law, Brigham Young University; B.A. Northwestern University; J.D. University of Chicago.

THE IMPACT OF ANTITRUST LAW ON THE LEGAL PROFESSION

Thomas D. Morgan*

LAW has ceased being a profession and has become a business. This usually-critical assertion is often heard today,¹ and in significant part it may be true. One measure of its truth—and a partial reason for that truth—may be the fact that at least since 1975, the standards and conduct of the legal profession have been subject to scrutiny under the antitrust laws.² This article examines how that scrutiny came about, what has limited the apparent significance of the new exposure, and some areas in which the antitrust laws may limit lawyers' instinctive responses.

I. A BRIEF OVERVIEW OF THE DEVELOPMENT OF THE U.S. ANTITRUST LAWS

What we now call antitrust law did not begin in the United States. Americans inherited the British law of restraint of trade as part of the common law tradition.³ Since at least the seventeenth century, common law courts had been wary of monopoly of a market by a single firm, especially where the monarch had granted the monopoly.⁴ The courts had also examined contracts such as restrictive covenants upon the sale of a business, finding some unreasonable and thus unenforceable restraints of trade, but others sufficiently limited in scope and duration to be enforced.⁵ American states incorporated these common law principles in their statutes and decisional law.⁶

* Rex E. Lee Professor of Law, Brigham Young University; B.A. Northwestern University; J.D. University of Chicago.

1. See Commission on Professionalism, American Bar Ass'n, *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism* (1986); Sol M. Linowitz & Martin Mayer, *The Betrayed Profession: Lawyering at the End of the Twentieth Century* (1994); Carl T. Bogus, *The Death of an Honorable Profession*, 71 Ind. L.J. 911 (1996). For a less critical account of the change, see Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. Rev. 1229 (1995); Deborah L. Rhode, *The Professionalism Problem*, 39 Wm. & Mary L. Rev. 283 (1998).

2. The watershed case was *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), discussed extensively *infra*.

3. See Michael J. Trebilcock, *The Common Law of Restraint of Trade: A Legal and Economic Analysis* (1986).

4. See *The Case of Monopolies*, 77 Eng. Rep. 1260 (1603); see also William Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act 19-22* (1965) (reporting Parliament's attack on Edward III by punishing a monopoly granted by the King).

5. See *Mitchel v. Reynolds*, 24 Eng. Rep. 347 (1711).

6. See Thomas D. Morgan, *Cases and Materials on Modern Antitrust Law and Its Origins* 20-22 (1994) (citing authorities).

The first federal antitrust legislation, the Sherman Act of 1890, was thus a relatively late addition to the regulatory arsenal. Industrial development in the last half of the nineteenth century made increased efficiency possible through production on a larger and larger scale. The states' restrictive treatment of business incorporation, in turn, had made it difficult for existing firms to combine. To bypass that problem, firms used a business trust, an entity that would hold controlling interest in multiple corporations and thus coordinate their activities. Small business owners—often quite successful in a world now becoming extinct—feared they would be driven out of business by firms consolidated in this way.⁷ They and the legislators sympathetic to their plight were said to be “anti trust.”⁸ Law firms, however, still tended to be small and were not remotely in the target area of drafters of the new antitrust legislation.

The first significant legal issue facing the new antitrust laws was when federal law became applicable, rather than the preexisting state legislation. The issue was posed in terms of whether the conduct of the challenged firms was in interstate commerce. The first Sherman Act case to reach the Supreme Court, *United States v. E.C. Knight Co.*,⁹ for example, involved the final consolidation of ninety-eight percent of the nation's sugar refiners into one firm, American Sugar Refining Co. The Court held there was no basis for federal jurisdiction over the transaction,¹⁰ reasoning that sugar is refined in plants each located within a single state.¹¹ Although the sugar was clearly intended for sale around the country and the world, refining is “manufacture” while “commerce succeeds to manufacture and is not a part of it.”¹²

A second question, significant from the earliest days of the Sherman Act, was what constituted “trade or commerce,” the restraint or monopolizing of which was prohibited by the antitrust laws. An early series of much criticized Supreme Court decisions held that labor un-

7. *See id.* For a longer account of the legal and economic development, see Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (1992); Herbert Hovenkamp, *Enterprise and American Law, 1836-1937* (1991).

8. Controversy about the objectives of the Sherman Act has existed since shortly after its adoption. *See* Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (1978); Hans B. Thorelli, *The Federal Antitrust Policy: Origination of an American Tradition* 164-232 (1954). The best single source for the legislative history is 2 *The Legislative History of the Federal Antitrust Laws and Related Statutes, Part I: The Antitrust Laws* §§ 15.1.1, 15.1.2 (Earl W. Kintner ed., 1978). The legislative debates and multiple lines of concern expressed therein are summarized in Morgan, *supra* note 6, at 22-28.

9. 156 U.S. 1 (1895).

10. *See id.* at 17-18.

11. *See id.* at 10.

12. *Id.* at 12. Justice Harlan dissented, arguing that the effects of the consolidation would be felt nationwide and that no single state would have the capacity to control it. *See id.* at 43 (Harlan, J., dissenting).

ions, for example, could be seen as cartels of workers engaged in trade or commerce and that ordinary labor strikes were therefore illegal.¹³

Both the "interstate commerce" and "trade or commerce" questions were important because of a third unsettled issue, the reach of the Sherman Act. Section 1 provides: "Every contract . . . in restraint of trade . . . is declared to be illegal."¹⁴ Section 2 continues, "[e]very person who shall monopolize . . . shall be deemed guilty."¹⁵ For more than twenty years, the Court split five to four over the significance of the word "every."

To the Court majority, led by Justice Peckham, the term was self-explanatory and meant that no evidence about the economic effect or "reasonableness" of a trade restraint or market share would be admissible.¹⁶ That helps explain why the Court took such a restrictive view of what acts were in "interstate commerce" and came to restrict its view of what was in "trade or commerce." Only by doing so could the majority find principled bases to keep the Sherman Act from creating both a federal commercial law and a federal labor law.

The artificial use of these concepts as a way of limiting the reach of the Sherman Act is perhaps the best way to understand the Court's otherwise-nonsensical decision in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*.¹⁷ The plaintiff was a Baltimore baseball team that played in a league that wanted to be merged into the major leagues.¹⁸ When the major leagues admitted some teams from the plaintiff's league but not the plaintiff, it sued the major leagues for conspiring to monopolize the sport.¹⁹ A jury agreed with the plaintiff and awarded substantial damages that were then trebled pursuant to the statute.²⁰

The Supreme Court affirmed the court of appeals decision, reversing a lower court judgment on both interstate commerce and trade or commerce grounds. Justice Holmes wrote for the Court:

The business is giving exhibitions of base ball [sic], which are purely state affairs. It is true that, in order to attain for these exhibitions the great popularity that they have achieved, competitions must be

13. See *Loewe v. Lawlor*, 208 U.S. 274 (1908). Professor Hovenkamp reports that twelve of the first thirteen antitrust violations found by American courts before 1900 involved efforts to break strikes. Hovenkamp, *supra* note 7, at 229. An important reason for adoption of the Clayton Act in 1914 was its section 6 that provides "[t]he labor of a human being is not a commodity or article of commerce" and hence is not subject to antitrust prosecution. Further, in order to end the use of the antitrust laws in labor cases, Congress passed the Norris-LaGuardia Act, 29 U.S.C. § 101 (1994), in 1932.

14. 15 U.S.C. § 1 (1994) (emphasis added).

15. *Id.* § 2 (emphasis added).

16. See *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 327-29 (1897).

17. 259 U.S. 200 (1922).

18. See *id.* at 207.

19. See *id.*

20. See *id.*

arranged between clubs from different cities and States. But the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines . . . is not enough to change the character of the business. . . . [T]he transport is a mere incident, not the essential thing.²¹

Then, in language that for many years gave lawyers comfort, Justice Holmes continued:

That to which it [the transport] is incident, the exhibition, although made for money would not be called trade or commerce in the commonly accepted use of those words. As it is put by the defendants, personal effort, not related to production, is not a subject of commerce. . . . [A] firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another State.²²

In the early years of the Sherman Act, a vocal minority, led by Justice White, argued that a "rule of reason" was implicit in the statutory term "restraint of trade" which had come from the common law and had been the basis for courts drawing distinctions based on reasonableness for several hundred years.²³ After Justice White was appointed Chief Justice by President Taft,²⁴ the "rule of reason" basis for interpreting the Sherman Act prevailed and the need to restrictively interpret interstate commerce and trade or commerce declined.²⁵

Nevertheless, in yet another case, *FTC v. Raladam Co.*,²⁶ the Court seemed again to suggest that lawyers might never be antitrust targets. The case tested the FTC's jurisdiction under section 5 of the Federal Trade Commission Act.²⁷ That section prohibits "unfair methods of

21. *Id.* at 208-09.

22. *Id.* at 209. Perhaps the best explanation for this decision was that the Justices liked baseball and even under the rule of reason analysis then in use, there would have been no good way to justify the league's monopoly. Certainly, that seemed the basis for the Court's failure to retreat from the decision even a half-century later in *Flood v. Kuhn*, 407 U.S. 258 (1972).

23. See *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 344-55 (1897) (White, Field, Gray & Shiras, JJ., dissenting).

24. President Taft himself was one of the nation's best antitrust judges, having created the "ancillary restraints" doctrine in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), when he was a judge of the Court of Appeals for the Sixth Circuit. He seems to have known how he wanted the split on the Supreme Court over this issue to be resolved.

25. The first case in which the "rule of reason" prevailed was *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). Adoption of the Clayton Act and the Federal Trade Commission Act, both in 1914, further clarified specific acts, such as mergers, that the antitrust laws were meant to reach. They also permitted other conduct, such as strikes, that the courts had mistakenly said the Sherman Act proscribed.

26. 283 U.S. 643 (1931).

27. See 15 U.S.C. § 45(a)(1) (1994).

competition" and creates FTC jurisdiction over antitrust matters parallel to that of the Justice Department.²⁸

In *Raladam*, the FTC had proceeded against a firm that manufactured an "obesity cure."²⁹ The manufacturer sold the product as a way to dissolve excess human fat, but the FTC argued that the advertisements for the "cure" were misleading in presenting it as effective and safe.³⁰ The Supreme Court held that whatever authority the FTC might have over misleading advertising, it did not get it from section 5 of the Act.³¹ That provision, like the rest of the antitrust laws, was "to protect small business against giant competitors."³² The Court continued: "Of course, medical practitioners, by some of whom the danger of using the remedy without competent advice was exposed, are not in competition with respondent. They follow a profession and not a trade."³³ Thus, the "learned profession" exception to the antitrust laws seemed to be confirmed, an exception which lawyers believed protected them as well.

Throughout the 1930s, the rule of reason prevailed on questions of substance, and law firms tended to be so small that they did not attract antitrust attention. In 1940, however, interpretation of the antitrust laws took an abrupt turn that ultimately caught even lawyers in the antitrust net. A key part of the Roosevelt Administration's strategy for dealing with the Depression was reflected in the National Industrial Recovery Act ("NIRA"). It involved creating "Codes of Fair Competition" in meetings of business, labor, and government representatives that, had the firms been acting on their own, clearly would have constituted criminal violations of section 1 of the Sherman Act.³⁴ The strategy was brought to an abrupt end, however, when the Supreme Court held important parts of the NIRA unconstitutional.³⁵ That brought authority for concerted activity to an end, but it did not always end the meetings. When President Roosevelt appointed Professor Thurman Arnold to head the Antitrust Division and SEC Chairman William O. Douglas to the Supreme Court, enforcement of the antitrust laws took on a new urgency.

28. *See id.* § 45(b).

29. *See Raladam*, 283 U.S. at 644.

30. *See id.* at 645-46.

31. *See id.* at 654.

32. *Id.* at 650.

33. *Id.* at 653.

34. *See Morgan, supra* note 6, at 188-92 (describing this period); *see also* Ellis W. Hawley, *The New Deal and the Problem of Monopoly* (1966) (analyzing the government's response to monopolies and antitrust issues at the time of the depression); Michael M. Weinstein, *Recovery and Redistribution Under the NIRA* (1980) (describing the "codes of fair competition" and evaluating their success in promoting recovery and redistributing income).

35. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

In *United States v. Socony-Vacuum Oil Co.*,³⁶ major oil companies had agreed to buy surplus gasoline from their smaller competitors and release it on the market so as to minimize price swings.³⁷ Output was reduced and prices measured over a reasonable span of time were not increased, but in a unanimous opinion for the Court, Justice Douglas held that any "combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing . . . price" constituted criminal conduct, illegal per se.³⁸ That is, once the coordinated activity was proved, no evidence of justification for the common action or "reasonableness" of the result achieved would be admissible. In an even more sweeping restatement of the rule, the combination was said to be illegal even though "no overt act is shown, though it is not established that the conspirators had the means available for accomplishment of their objective, and though the conspiracy embraced but a part of the interstate or foreign commerce in the commodity."³⁹

In that instant, not only was the dominance of the "rule of reason" brought to an end, but the Court had to set about defining what was per se illegal. Price fixing headed the list, but conduct subject to the per se rule was later expanded to include: (a) division of markets, as when one company agrees to sell only east of the Mississippi River and a second company only west;⁴⁰ (b) group boycotts, as when two or more firms agree that they will not do business with a supplier who does business with their competitors;⁴¹ (c) resale price maintenance, as when a manufacturer tries to have all retailers sell to consumers at the same price;⁴² and (d) tying arrangements, as where in order to lease a copy machine, the customer must buy all its copy paper from the machine manufacturer.⁴³

Simultaneous with development of the per se rule, however, the Court acknowledged that the antitrust laws did not stand alone in regulating business conduct. Accommodation of federal regulatory policy with antitrust policy had been an issue since adoption of the

36. 310 U.S. 150 (1940).

37. See *id.* at 178-98.

38. *Id.* at 223.

39. *Id.* at 225 n.59.

40. See *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951).

41. See *Fashion Originators' Guild of Am., Inc. v. FTC*, 312 U.S. 457, 466-67 (1941).

42. See *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960). Resale price maintenance had actually been held to be illegal during the first per se period, 1890-1911, when every contract in restraint of trade was illegal. See *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

43. See, e.g., *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 6 (1958) (holding that a tying arrangement is per se unreasonable and unlawful under the Sherman Act if the seller has the power appreciably to restrain competition for the tied product, and a "not insubstantial" amount of interstate commerce is affected); *International Salt Co. v. United States*, 332 U.S. 392 (1947) (holding it per se violative of the Sherman and Clayton Acts for a corporation to require lessees of its machines to use only the corporation's unpatented products in them).

Sherman Act,⁴⁴ and the Court came to recognize that even state regulation often required conduct that the antitrust laws would otherwise prohibit.⁴⁵ Thus, it had to decide which would prevail. It did just that in *Parker v. Brown*.⁴⁶

Parker v. Brown was decided only three years after *Socony-Vacuum*. Pursuant to the federal Agricultural Marketing Act, California had adopted a program for marketing raisins, ninety-five percent of which were sold out of state.⁴⁷ Each California raisin grower was required to submit all of its production to a receiving station to be classified as standard, substandard, or inferior.⁴⁸ Inferior raisins, deemed unfit for human consumption, could only be sold for use as "by-products."⁴⁹ In addition, up to twenty percent of standard and substandard raisins had to be sold as by-products as well, and fifty percent had to be put into a "stabilization pool," i.e., kept off the market to keep prices up.⁵⁰

Producers therefore could only sell thirty percent of their crop through ordinary commercial channels, a result that one producer, Mr. Brown, challenged as violating the antitrust laws.⁵¹ The Court rejected his contention. It assumed that if the program had been adopted by private persons, it would have been a per se violation of section 1 of the Sherman Act.⁵² This, however, was a state-sanctioned program:

The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. . . .

There is no suggestion of a purpose to restrain state action in the Act's legislative history. . . . That its purpose was to suppress combinations . . . by individuals and corporations, abundantly appears from its legislative history.

44. For example, in *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 314-15 (1897), the court held that railroad regulation pursuant to the Interstate Commerce Act did not immunize from antitrust scrutiny a meeting among competing railroads to decide what rates to propose to the Interstate Commerce Commission ("ICC"). In *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156, 162 (1922), on the other hand, the Court held that ICC regulatory authority would be undercut if private plaintiffs could collect treble damages for ICC-approved rates that had been proposed after such an illegal meeting. In *Georgia v. Pennsylvania Railroad*, 324 U.S. 439, 451-52 (1945), however, the court permitted states to enjoin the illegal meetings.

45. See *Parker v. Brown*, 317 U.S. 341, 348-49 (1943).

46. See *id.* at 350-52.

47. See *id.* at 345.

48. See *id.* at 347.

49. *Id.* at 347-48.

50. *Id.* at 348.

51. See *id.* at 348-49.

52. See *id.* at 350.

True, a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful

[But here, the state] as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.⁵³

By the early 1940s, the Court was reluctant to indulge arguments about limits on the federal commerce power,⁵⁴ so that basis for protecting lawyers was weaker as well. The remaining question was whether lawyers were engaged in trade or commerce, and that answer was foreshadowed shortly after *Parker* in 1943 by *AMA v. United States*.⁵⁵

Group Health Association was an organization of federal employees that had employed doctors on a salaried basis to treat association members on a pre-paid, risk-sharing basis, i.e., it was a very early HMO. Such a method of providing medical services violated the AMA code of ethics, and hospitals in the Washington area were persuaded by AMA-member doctors not to admit Group Health patients. In antitrust terms, that constituted a classic illegal group boycott, but the district court had sustained a demurrer, stating that neither the practice of medicine nor Group Health's business constituted "trade" within the meaning of the Sherman Act.

The Supreme Court reversed. Although the Court avoided declaring head-on that medicine is a "trade," it still found doctors liable for a Sherman Act violation. Group Health was in the business of obtaining medical care for its members on a pre-paid basis. The Sherman Act prohibits "any person" from restraining trade, so "the calling or occupation of the individual physicians charged as defendants is immaterial if the purpose and effect of their conspiracy was . . . obstruction and restraint of the business of Group Health."⁵⁶

By even the early 1940s, then, an impartial observer should have been able to see that lawyers were potentially subject to Sherman Act

53. *Id.* at 351-52 (citations omitted). In follow-up litigation testing the scope of the *Parker* "state action" exemption, the Court held that joint lobbying activities by competitors and the meetings necessary to coordinate their approaches also were not the kind of conduct the antitrust laws were designed to prohibit. See *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

54. Two of the key cases were *United States v. Darby*, 312 U.S. 100 (1941), and *Wickard v. Filburn*, 317 U.S. 111 (1942).

55. 317 U.S. 519 (1943).

56. *Id.* at 528. In addition, in *United States v. National Ass'n of Real Estate Boards*, 339 U.S. 485 (1950), the court held that real estate brokers were not a learned profession and said "[t]he fact that the business involves the sale of personal services rather than commodities does not take it out of the category of 'trade' within the meaning of . . . the Act." *Id.* at 490.

prosecution. Consequently it was fortuitous that it took thirty years for the Supreme Court to confirm that reality.⁵⁷

II. THE TURNING POINT—*GOLDFARB V. VIRGINIA STATE BAR*

Lewis Goldfarb was a lawyer working at the Federal Trade Commission in Washington, D.C. He and his wife wanted to buy a house in Reston, Virginia, a town near Washington in Fairfax County. Their prospective mortgagee required them to get title insurance. That, in turn, required a title opinion that could only be rendered by a member of the Virginia State Bar. The first lawyer whom they contacted quoted them a fee of one percent of the price of their new house, the precise rate specified in a minimum fee schedule published by the Fairfax County Bar Association. The Goldfarbs then contacted thirty-six other lawyers by mail, and nineteen replied. None would examine a title for less than the one-percent fee and several said that they knew of no other lawyer who would do so.⁵⁸

The “suggested” minimum fee schedule was not on every lawyer’s desk. It was described as “advisory,” and to see it at all, lawyers had to specially ask for it at the courthouse. “Nevertheless, the fee schedule states that its ‘consistent and intentional violation . . . for the purpose of increasing business can, under given circumstances, constitute solicitation’”⁵⁹ of legal business, a violation of the Virginia lawyer disciplinary rules.⁶⁰

Stymied in their attempts to find a lower-priced lawyer, the Goldfarbs filed a class action suit against both the Fairfax County Bar Association (a voluntary association) and the Virginia State Bar (a state agency), alleging price fixing in violation of section 1 of the Sherman Act.⁶¹ The district court found the county bar guilty of such a violation. “Minimum fee schedules are a form of price fixing,” the court said, and “‘price fixing is *per se* an unreasonable restraint of

57. The point did not go entirely unnoticed. See, e.g., Thomas D. Morgan, *Where Do We Go from Here with Fee Schedules*, 59 A.B.A. J. 1403 (1973) (warning of the possibility that attorney fee schedules may be a violation of the Sherman Act); Note, *The Applicability of the Sherman Act to Legal Practice and Other “Non-Commercial” Activities*, 82 Yale L.J. 313 (1972) (discussing the Sherman Act’s applicability to the legal profession).

58. These facts are taken from the Supreme Court opinion. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 775-76 (1975). The case was tried in the District Court in part on stipulated facts incorporated in the opinion by reference. See *Goldfarb v. Virginia State Bar*, 355 F. Supp. 491, 492-93 (E.D. Va. 1973), *aff’d in part and rev’d in part*, 497 F.2d 1 (4th Cir. 1974), *rev’d*, 421 U.S. 773 (1975).

59. *Goldfarb v. Virginia State Bar*, 497 F.2d 1, 4 (4th Cir. 1974), *rev’d*, 421 U.S. 773 (1975).

60. The Virginia State Bar had announced an intention to impose discipline on this basis. See *Virginia State Bar*, Op. 98 (1960). The County bar fee schedule closely followed the “guidelines” set forth by the State Bar. See *id.*

61. They also sued the Arlington County Bar Association and the Alexandria Bar Association, both of whom agreed to cancel their fee schedules and never reinstate them. See *Goldfarb*, 497 F.2d at 3 n.1.

trade. It is not for the courts to determine whether in particular settings price-fixing serves an honorable or worthy end.'"⁶²

The argument the County Bar presented in favor of percentage fees was that they resulted in overcharging some clients so as to be able to undercharge others. That, Judge Bryan said, "is sufficient for the Court to infer, which it does, that some damage resulted to the plaintiff."⁶³ The court also found that interstate commerce was clearly affected by the fee schedule. The title search was done as a requirement of the Goldfarb's mortgage, and

a significant portion of funds furnished for the purchasing of homes in Fairfax County comes from without the State of Virginia . . . [,] a large percentage of persons who live in Fairfax County work outside of Virginia and that significant amounts of loans on Fairfax County real estate are guaranteed by the United States Veterans Administration and Department of Housing and Urban Development, both headquartered in the District of Columbia.⁶⁴

The title search thus was an integral part of an interstate financial transaction and a basis existed for antitrust jurisdiction.⁶⁵

As for the "learned profession" exemption, the Court found:

"The fact that the business involves the sale of personal services rather than commodities does not take it out of the category of 'trade.'" [Indeed, t]he Court has some question whether the adoption of a minimum fee schedule is itself "professional." . . . [That term] properly contemplates differences in abilities, worth and energies expended of those rendering the services. Such differences are made as meaningless by a minimum fee schedule as they would be by a maximum fee schedule. . . . Certainly fee setting is the least "learned" part of the profession.⁶⁶

Finally, the District Court found that, while the Virginia State Bar had acted within its "statutory or rule-created authority" and thus was not liable to the Goldfarbs pursuant to *Parker v. Brown*, the conduct of Fairfax County's "voluntary" Bar was not similarly protected.⁶⁷

Both the County Bar and the Goldfarbs appealed to the Fourth Circuit. On the application of *Parker v. Brown*, the Court said that the restrictions had to be an integral part of state regulation, not imposed after the fact to ratify private conduct.⁶⁸ Minimum fee schedules were

62. *Goldfarb*, 355 F. Supp. at 493 (citing *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485 (1950)).

63. *Id.* at 494.

64. *Id.*

65. *See id.*

66. *Id.* at 495 (quoting *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485, 490 (1950)).

67. *See id.* at 495-96.

68. *See Goldfarb v. Virginia State Bar*, 497 F.2d 1, 6-10 (4th Cir. 1974), *rev'd*, 421 U.S. 773 (1975). The case the court contrasted with *Parker* was *Asheville Tobacco*

said to be an example of the former, so the State Bar was entitled to *Parker* immunity.⁶⁹

We cannot ignore the fact that in some instances adherence to a suggested minimum fee schedule is financially helpful to the individual attorney. Still, minimum fee schedules are only one factor among a multitude of variables that interrelate to provide the public with competent legal service. . . . It is manifestly unfair to dissect a state's regulatory program into its various component parts, parts that were meant to interrelate, and then to declare that, because some factors may benefit those to be regulated, the program falls outside the *Parker* exception.⁷⁰

The Fourth Circuit declined to extend *Parker* protection to the County Bar,⁷¹ and found it "abundantly clear . . . that the fee schedule and the enforcement mechanism supporting it act as a substantial restraint upon competition among attorneys practicing in Fairfax County."⁷²

On interstate commerce and learned profession grounds, however, the court sustained the County Bar appeal.⁷³ On the learned profession issue, the court wrote: "We do not intend to suggest that any learned profession is above the law. The 'learned profession' exemption is . . . applicable only to those matters with respect to which an accord must be reached between the necessities of professional regulation and the dictates of the antitrust laws."⁷⁴ But, consistent with its *Parker* analysis, it found that fee schedules were part of an integrated system of regulation, no part of which could be condemned separately from the whole.⁷⁵

As for the interstate commerce question, the court noted that all of the acts complained of occurred within Virginia and thus concluded they had no "direct and substantial" effect on commerce.⁷⁶ The fact the Goldfarbs worked in Washington and that their mortgage funds came from out of state constituted no more than an "incidental" effect

Board of Trade v. FTC, 263 F.2d 502 (4th Cir. 1959), in which it had found such an attempted after-the-fact ratification of price fixing in tobacco markets.

69. See *Goldfarb*, 497 F.2d at 9-10.

70. *Id.* at 10 (footnotes omitted). The court later considered whether the fact the leadership of the State Bar was composed of the very persons to be regulated required reexamination of this conclusion. See *id.* at 11. It found that the Virginia Supreme Court expressly gave the Bar authority to create fee schedules and relied on them in setting court-awarded fees. See *id.* That involvement of the court was deemed sufficient to constitute active supervision of the State Bar by independent state officials. See *id.*

71. See *id.* at 12.

72. *Id.* at 13.

73. See *id.* at 15-16.

74. *Id.* at 15.

75. See *id.*

76. See *id.* at 16.

on commerce, not enough to support jurisdiction to invoke the Sherman Act.⁷⁷

In the Supreme Court, however, the Goldfarbs prevailed on every issue,⁷⁸ and the Court's decision was unanimous.⁷⁹ On the question of price fixing, Chief Justice Burger wrote for the Court that in the minimum fee schedule, "a naked agreement was clearly shown."⁸⁰ It was enforced not only by prospective discipline but also by "the desire of attorneys to comply with announced professional norms."⁸¹ The fact that the Goldfarbs found no actual price competition further showed this to be "a classic illustration of price fixing."⁸² Interstate commerce was affected because title examinations were an integral part of the "interstate aspects of [financing] real estate transactions."⁸³

Parker v. Brown, in turn, did not protect even the State Bar because the Virginia Supreme Court had not *required* the promulgation of fee schedules. Instead, "[t]he State Bar, by providing that deviation from County Bar minimum fees may lead to disciplinary action, has voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act."⁸⁴

But it was the Court's rejection of the learned profession exemption that has had the most direct effect on lawyers and other professionals. The Court could not have been clearer:

The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act, nor is the public-service aspect of pro-

77. See *id.* at 18. Judge Craven dissented. He believed the Washington, D.C., housing market was multi-state and therefore interstate in character, such that increasing the price of Virginia real estate through use of a minimum fee schedule inevitably affected Maryland and D.C. transactions as well. See *id.* at 21-22 (Craven, J., dissenting). He further argued that the so-called learned profession exemption was based on dicta and could not be justified or explained on any principled basis. See *id.* at 23-24 (Craven, J., dissenting).

78. The United States appeared *amicus curiae* on the side of the Goldfarbs in the person of Solicitor General Robert Bork, who had made his academic reputation primarily as an antitrust scholar. Much of his work is collected in Bork, *supra* note 8. His appearance was consistent with the Government's position on minimum fee schedules in *United States v. Oregon State Bar*, 385 F. Supp. 507 (D. Or. 1974), a case filed by the Justice Department but trailing *Goldfarb* in its passage through the courts. The district court in Oregon rejected the Fourth Circuit's analysis, see *id.* at 512, and it seems likely the existence of the public action and the resulting split of authority helped persuade the Supreme Court of the significance of the antitrust issues presented.

79. Justice Powell, a member of the Virginia Bar and former President of the ABA, did not participate in the decision. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 774 (1975).

80. *Id.* at 782.

81. *Id.* at 781.

82. *Id.* at 783.

83. *Id.* at 785.

84. *Id.* at 791-92. As seen later, by current standards, this was an unduly narrow reading of the *Parker* exception. See *infra* text accompanying notes 135-68.

fessional practice controlling in determining whether § 1 includes professions. Congress intended to strike as broadly as it could in § 1 . . . and to read into it so wide an exemption as that urged on us would be at odds with that purpose.⁸⁵

Certainly, no exemption is found in the text of the Act; “[l]anguage more comprehensive is difficult to conceive.”⁸⁶ The Court read the terms “trade or commerce” literally:

Whatever else it may be, the examination of a land title is a service; the exchange of such a service for money is “commerce” in the most common usage of that word. It is no disparagement of the practice of law as a profession to acknowledge that it has this business aspect. . . . In the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse, and that anticompetitive activities by lawyers may exert a restraint on commerce.⁸⁷

In closing, however, the Court backed off a bit from the otherwise clear implications of its holding. In part, the language seems to be a salve for bruised professional egos, but later cases have demonstrated its importance:

We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that . . . they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that “forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.” The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been “officers of the courts.” In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions.⁸⁸

III. THE IMPACT OF *GOLDFARB* ON PROFESSIONS GENERALLY

Ironically, the principal impact of *Goldfarb* has been on other professionals, not lawyers. Furthermore, the Supreme Court has moved away from rigid application of the per se rule to several important areas of previous antitrust concern. Mergers,⁸⁹ vertical allocation of

85. *Goldfarb*, 421 U.S. at 787 (citations omitted).

86. *Id.* (quoting *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553 (1944)).

87. *Id.* at 787-88. Such an analysis is at the heart of Geoffrey C. Hazard, Jr. et al., *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. Rev. 1084 (1983).

88. 421 U.S. at 792-93 (citations omitted).

89. *See, e.g., United States v. Marine Bancorporation, Inc.*, 415 U.S. 486 (1974) (adopting more restrictive market definitions than the Court had previously used and

territories,⁹⁰ group boycotts,⁹¹ monopoly behavior,⁹² and even tying arrangements⁹³ have come to be analyzed either under a "rule of reason" or something closely approaching it. The subject of *Goldfarb*—price fixing among competitors—remains largely subject to per se prohibition,⁹⁴ and extension of the antitrust laws to all professionals is clearly here to stay.⁹⁵

That extension was confirmed three years after *Goldfarb* in *National Society of Professional Engineers v. United States*.⁹⁶ The code of ethics for civil engineers provided that engineers could not participate in a process where price was part of the initial selection criteria.⁹⁷ The client could make price a factor in its selection of an engineer, of course, but the client's initial selection had to be based on the quality of the engineer's prior work.⁹⁸ If the price offered by the best engineer was unsatisfactory, the client could negotiate with the second best engineer, and so on.⁹⁹ The engineers argued that selection based primarily or solely on price would tend to reduce the safety of projects, and offered this as an answer to the Justice Department's petition to nullify the rule.¹⁰⁰

The Supreme Court affirmed the holding of the lower courts that no such defense was available in a case brought under section 1 of the Sherman Act.¹⁰¹ The Society's rule did not constitute price fixing, the

foreshadowing the present relatively tolerant judicial attitude toward mergers); *United States v. General Dynamics Corp.*, 418 U.S. 602 (1974) (same).

90. See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). *Continental T.V.* is the case most often seen as the turning point away from the post-1940 per se era of antitrust law to the more nuanced analysis used today.

91. See *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985).

92. See, e.g., *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (adopting a more restrictive interpretation of what constitutes proof of predatory pricing).

93. See, e.g., *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984) (failing to adopt a rule of reason analysis but restricting the availability of the per se rule).

94. But see, e.g., *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979) (allowing a defense that price fixing contributes to efficient functioning of a market to avoid the per se rule and permitting blanket licensing under a rule of reason analysis).

95. For a contemporaneous analysis of these developments, see Philip C. Kissam, *Antitrust Law and Professional Behavior*, 62 Tex. L. Rev. 1 (1983); Panel, *Antitrust and the Professions: Conflict or Accommodation?*, 52 Antitrust L.J. 161 (1983). In some of the cases that followed, the Court suggested a rule of reason will be employed in cases involving professionals. The practical effect of that concession, however, has been small, given the Court's willingness only to consider the competitive consequences of a rule. See *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978).

96. 435 U.S. 679 (1978).

97. See *id.* at 683.

98. See *id.* at 684.

99. See *id.* at 684 n.6.

100. See *id.* at 685.

101. See *id.* at 689-90.

Court acknowledged, because competitors did not agree what prices to charge.¹⁰² But the rule constituted a restraint on “the ordinary give and take of the marketplace,”¹⁰³ and thus violated section 1. Furthermore, not only was the “learned profession” exemption irrelevant to the Court, even the special importance of the subjects with which professionals deal was irrelevant to antitrust analysis.¹⁰⁴ In looking at a restraint of trade, a court may only consider:

[T]he competitive significance of the restraint; it [may not] decide whether a policy favoring competition is in the public interest Subject to exceptions defined by statute, that policy decision has been made by the Congress. . . .¹⁰⁵

. . . .

. . . The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. . . . Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.¹⁰⁶

That message was reaffirmed in 1984 in *Arizona v. Maricopa County Medical Society*.¹⁰⁷ Phoenix doctors who did not work for HMOs got together to set the maximum fees they would charge for designated procedures.¹⁰⁸ Working in conjunction with health insurance companies serving the area, they established a system that gave patients the same type of one-price, full-service care offered by HMOs, but with a free choice among physicians.¹⁰⁹ The Court held the plan per se illegal:

Nor does the fact that doctors—rather than nonprofessionals—are the parties to the price-fixing agreements support the respondents’ position. . . . The respondents do not [even] argue, as did the defendants in *Goldfarb* and *Professional Engineers*, that the quality of the professional service that their members provide is enhanced by the price restraint. . . . [T]he claim that the price restraint will make it easier for customers to pay does not distinguish the medical profession from any other provider of goods or services.¹¹⁰

102. *See id.* at 692.

103. *Id.*

104. *See id.* at 695-96.

105. *Id.* at 692 (footnote omitted).

106. *Id.* at 695. For an attempt to model the economic effects of professional standards, see John E. Lopatka, *Antitrust & Professional Rules: A Framework for Analysis*, 28 San Diego L. Rev. 301 (1991).

107. 457 U.S. 332 (1982).

108. *See id.* at 339.

109. *See id.* at 341.

110. *Id.* at 348-49. The fact that the plan involved setting of maximum prices also did not help the doctors. Maximum price fixing had been held per se illegal in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951).

Dentists, in turn, found no more sympathy from the Court two years later in *FTC v. Indiana Federation of Dentists*.¹¹¹ The respondents became upset when dental insurers demanded that they send patient x-rays to the insurers so that they could verify the need for treatment.¹¹² In terms that sound familiar today, the dentists objected to cost accountants intruding into decisions about patient care.¹¹³ They formed a "union" and decided not to cooperate with the insurers' demands, an action challenged by the FTC on the ground that the dentists were primarily seeking to improve their own incomes. The Supreme Court agreed with the FTC,¹¹⁴ and found that the dentists' action "impairs the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them."¹¹⁵ Quality of care arguments were unconvincing and irrelevant to the Court, and the dentists were ordered to cease and desist from their conduct.¹¹⁶

*Patrick v. Burget*¹¹⁷ further illustrated just how far professional liability could reach. A doctor who wanted medical privileges at a local hospital had previously refused to join the private clinic in which most of the town's doctors practiced.¹¹⁸ When the doctor was denied privileges based on the adverse recommendation of the hospital's peer review committee, he sued the committee members, alleging that the action was a group boycott by members of the private clinic in violation of section 1 of the Sherman Act.¹¹⁹

The Court of Appeals ruled that the claim was barred by *Parker v. Brown*.¹²⁰ Peer review committees are mandated by state law and supervised by the State Health Division, the Court reasoned, and if they are to be free to protect patients from bad doctors, they in turn need protection from suits filed by doctors dissatisfied by their decisions.¹²¹ But again, the Supreme Court reversed.¹²² Hospitals are required to have peer review committees, it said, but the State does not actively

111. 476 U.S. 447 (1986).

112. *See id.* at 449.

113. *See id.*

114. *See id.* at 451-53.

115. *Id.* at 459. The dentists abandoned the claim that their dental "union" was the kind of employee organization that section 6 of the Clayton Act intended to insulate from antitrust liability. *See id.* at 451.

116. *See id.* at 462-64.

117. 486 U.S. 94 (1988).

118. *See id.* at 96.

119. *See id.* at 97-98.

120. *Patrick v. Burget*, 800 F.2d 1498, 1505 (9th Cir. 1986) (citing *Parker v. Brown*, 317 U.S. 341, 350-51 (1943)).

121. *See id.*

122. *See FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986).

review the substance of their decisions.¹²³ The committee members were thus exposed to potential treble damage liability.¹²⁴

IV. CASES IN WHICH LAWYERS HAVE AVOIDED ANTITRUST LIABILITY

Of course, the fact that lawyers are subject to the antitrust laws is only the beginning of the inquiry in any given case. For example, sometimes plaintiffs throw an antitrust count into a case involving lawyers that clearly does not state a valid antitrust claim. *Amey, Inc. v. Gulf Abstract & Title, Inc.*,¹²⁵ is typical of a series of cases¹²⁶ in which borrowers complained that banks required them to pay for title opinions issued by lawyers chosen by the banks. That, the borrowers said, constitutes a tying arrangement in which in order to get what they want—the mortgage—they have to pay for something they do not want—the title opinion.¹²⁷ Courts consistently reject such claims.¹²⁸ First, the banks lack the market power required under the tying doctrine to compel borrowers to use bank-approved lawyers and, second, the loan and the title opinion should be viewed as a single product so that no tying is involved.¹²⁹

In *Hester v. Martindale-Hubbell, Inc.*,¹³⁰ a lawyer unsuccessfully complained that he could not buy a listing in the biographical section of the defendant's directory because he had not yet earned the "rating" Martindale-Hubbell required. The court held the defendant's choice of rating criteria was made unilaterally and thus could not constitute a group boycott.¹³¹ Furthermore, some other courts have held that the fact the ABA had criteria to determine in what law lists law-

123. See *Patrick*, 800 F.2d at 1506.

124. Congress has since expressly insulated most peer review decisions from antitrust liability in the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101 (1994). In two earlier cases, courts had sustained charges that physicians' efforts to deny hospital privileges to chiropractors and osteopaths constituted group boycotts. See *Weiss v. York Hosp.*, 745 F.2d 786 (3d Cir. 1984); *Wilk v. AMA*, 719 F.2d 207 (7th Cir. 1983).

125. 758 F.2d 1486 (11th Cir. 1985).

126. Other cases include *Sibley v. Federal Land Bank*, 597 F.2d 459 (5th Cir. 1979), *Foster v. Maryland State Savings & Loan Ass'n*, 590 F.2d 928 (D.C. Cir. 1978), *Forrest v. Capital Buildings & Loan Ass'n*, 504 F.2d 891 (5th Cir. 1974), and *Mortensen v. First Federal Savings & Loan Ass'n*, No. 1763-73, 1975 U.S. Dist. LEXIS 16505 (D.N.J. Aug. 20, 1975).

127. See *Amey*, 758 F.2d at 1491-92.

128. See *id.* at 1502-03.

129. See also *Guzik v. State Bar*, No. B-78-300, 1980 U.S. Dist. LEXIS 15180 (S.D. Tex. July 29, 1980) (holding that it was not price fixing for a debt collector to use a State Bar form saying the attorney's fee will be ten percent of sums recovered); *Hearity v. Board of Supervisors*, 437 N.W.2d 903 (Iowa 1989) (holding that a county's hiring of three lawyers to handle all publicly-funded criminal defense does not constitute price fixing).

130. 659 F.2d 433 (4th Cir. 1981).

131. See *id.* at 436.

yers could ethically advertise did not constitute a conspiracy between Martindale-Hubbell and the ABA.¹³²

By far the most important doctrine insulating lawyers from liability has turned out to be the *Parker v. Brown* "state action" exemption. The defense had been rejected in *Goldfarb*, of course, but the appropriateness of state professional regulation had been acknowledged and applied in other contexts, and has greatly reduced the impact of the antitrust laws on lawyers.¹³³

Bates v. State Bar,¹³⁴ for example, is best remembered as the case holding restrictions on lawyer advertising unconstitutional. Of almost equal importance, however, was its rejection of a Sherman Act challenge to the prohibition of lawyer advertising.¹³⁵ In *Goldfarb*, the Court said, the Virginia Supreme Court did not compel the promulgation of a minimum fee schedule, whereas the Arizona Supreme Court had specifically prohibited lawyer advertising in DR 2-101(B) of its Code of Professional Responsibility.¹³⁶

132. See *Saxe, Bacon & Bolan v. Martindale-Hubbell, Inc.*, 710 F.2d 87, 90 (2d Cir. 1983); cf. *Paralegal Institute, Inc. v. ABA*, 475 F. Supp. 1123 (E.D.N.Y. 1979) (holding that the ABA's failure to accredit a paralegal school amounts to neither a group boycott of the plaintiff nor a monopolization of the legal profession).

133. The *Goldfarb* Court noted:

We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for . . . regulating the practice of professions. . . . [W]e intend no diminution of the authority of the State to regulate its professions.

Goldfarb v. Virginia State Bar, 421 U.S. 773, 792-93 (1975).

134. 433 U.S. 350 (1977).

135. See *id.* at 362-63.

136. See *id.* at 359-60 (citing *Goldfarb*, 421 U.S. at 790). A second ground for the Court's holding involved its distinguishing *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), in which a private utility, the sole supplier to southeastern Michigan, had been unable to claim the state regulation exception for its self-initiated program of distributing free light bulbs to its customers. By contrast, the Court said, a challenge to the Arizona lawyer advertising prohibition was in effect a suit against the Arizona Supreme Court itself, and "Federal interference with a State's traditional regulation of a profession is entirely unlike the intrusion the Court sanctioned in *Cantor*." *Bates*, 433 U.S. at 362 (footnote omitted).

Bates was closely followed, in turn, by *Princeton Community Phone Book, Inc. v. Bate*, 582 F.2d 706 (3d Cir. 1978), filed against the Advisory Committee on Professional Ethics of the New Jersey Supreme Court. The Committee had issued an opinion prohibiting lawyers from listing themselves in local Yellow Pages advertising. See *id.* at 709. The Court recognized the case as different from *Bates* but it reached the same result. See *id.* at 710-11.

Defendants here were not enforcing a clear command of the New Jersey Supreme Court, but were interpreting an unclear command and enforcing their interpretation. However, in contrast to *Bates* and *Goldfarb*, defendants here were acting as part of an agency created by the New Jersey Supreme Court for the sole purpose of serving the state. Thus, while the relationship between the Committee's activity and the command of the state is not as close as that relationship in *Bates*, the relationship between the Committee as an entity and the State Supreme Court is closer.

Next, *Hoover v. Ronwin*¹³⁷ examined the possible antitrust liability of bar examiners for “artificially reducing the numbers of competing attorneys in the State of Arizona.”¹³⁸ Ronwin had failed the Arizona bar examination, given under the authority of the Arizona Supreme Court but prepared and graded by the Court’s Committee on Examinations and Admissions.¹³⁹ After failing to persuade the Arizona Supreme Court to admit him in spite of his exam score, Ronwin sued the Committee members individually, alleging they were part of a conspiracy in violation of section 1 of the Sherman Act.¹⁴⁰ The district court dismissed the claim, citing *Parker*, but the Ninth Circuit reversed, holding that a hearing was required to determine whether the state regulation exemption applied.¹⁴¹

The Supreme Court disagreed.¹⁴² Hoover and his colleagues were selected and appointed by the Arizona Supreme Court and conceded to be state officers, the court said.¹⁴³ They acted pursuant to explicit Arizona Supreme Court rules as to the subjects to be tested, and that court had approved the scoring system that Ronwin complained about.¹⁴⁴ Ronwin had been given a right to challenge the scoring system and the court itself made the final decision denying his admission to practice.¹⁴⁵ The court concluded: “Thus, the conduct that Ronwin challenges was in reality that of the Arizona Supreme Court. . . . It therefore is exempt from Sherman Act liability under the state-action doctrine of *Parker v. Brown*.”¹⁴⁶

Id. at 718-19. Doctors, lacking an official agency through which to write their ethical standards into law, have been ordered to cease and desist from asserting ethical limits on advertising. See *AMA v. FTC*, 638 F.2d 443, 449-50 (2d Cir. 1980).

137. 466 U.S. 558 (1984).

138. *Id.* at 565 (footnote omitted).

139. See *id.* at 560-61.

140. See *id.* at 564-65.

141. See *Ronwin v. State Bar*, 686 F.2d 692 (9th Cir. 1981), *rev’d sub nom.*, *Hoover v. Ronwin*, 464 U.S. 810 (1983).

142. See *Hoover*, 466 U.S. at 567.

143. See *id.* at 572.

144. See *id.* Between the decision in *Bates* and the decision in *Hoover*, the Court decided *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). After *Midcal*, the inquiry was no longer whether a state agency had required the private action, but rather: (1) whether the challenged restraint had been “clearly articulated and affirmatively expressed as state policy,” and (2) whether the policy was “actively supervised by the State itself.” *Id.* at 105. Had the test not been changed, it might have been hard for the bar examiners to fit within the exemption. The exam scoring system had been supervised and approved by the state Supreme Court, for example, but not necessarily required by it as *Goldfarb* and *Bates* had demanded.

145. See *Hoover*, 466 U.S. at 564.

146. *Id.* at 573 (footnote omitted). The Supreme Court vote was four to three, with Justices Stevens, White, and Blackmun dissenting, arguing that sufficient facts had been alleged to survive a motion to dismiss. Justices Rehnquist and O’Connor, both members of the Arizona bar, did not participate. See *id.* at 559; *cf.* *Thomas v. Kadish*, 748 F.2d 276 (5th Cir. 1984) (affirming a district court’s dismissal of a suit by an applicant denied admission to the Texas bar based on lack of subject matter jurisdiction to

A third major application of *Parker* has been in the preservation of unauthorized practice rules. The plaintiff in *Lawline v. ABA*¹⁴⁷ challenged Rules 5.4(b) and 5.5(b) of the ABA Model Rules of Professional Responsibility which prohibit lawyer partnerships with lay persons where any of the activities involve the practice of law and lawyers assisting lay persons to engage in the unauthorized practice of law.¹⁴⁸ The Illinois Supreme Court adopted both as part of the Illinois Rules of Professional Conduct.¹⁴⁹

Lawline was an unincorporated association of lawyers and paralegals that answered legal questions over the telephone and then referred cases to lawyers who agreed to charge reduced fees.¹⁵⁰ Lawyers to whom cases were referred paid Lawline a referral fee.¹⁵¹ When the United States Bankruptcy Trustee reported to the Illinois Supreme Court's Attorney Registration and Disciplinary Commission that paralegals at Lawline were giving legal advice to debtors and, later, tried to enjoin Lawline from practicing law in bankruptcy cases, Lawline filed suit alleging a conspiracy between the courts and the organized bar to monopolize the practice of law.¹⁵²

The district court dismissed the complaint,¹⁵³ and the Seventh Circuit affirmed.¹⁵⁴ The challenged rules had been adopted by both the Illinois Supreme Court and the Federal District Court for the Northern District of Illinois. While the Illinois State Bar Association, a voluntary bar, had issued opinions under those rules, those opinions had no force unless the courts agreed with them, and the rest of the defendants were all federal and state officials. Thus, all of the conduct was exempt from Sherman Act liability.¹⁵⁵

review the state court's action); *Pawlak v. Nix*, No. 95-5265, 1996 U.S. Dist. LEXIS 14523 (E.D. Pa. Sept. 30, 1996) (dismissing complaints against bar examiners under the Rooker-Feldman doctrine which says that United States district courts lack jurisdiction to review state court decisions in individual bar admission cases).

147. 956 F.2d 1378 (7th Cir. 1992).

148. *See id.* at 1381.

149. *See id.*

150. *See id.*

151. *See id.*

152. *See id.* at 1382. Lawline denied the charges against it and, in this case, the court declined to address their factual accuracy. *See id.* at 1382 n.2.

153. *See id.* at 1381.

154. *See id.*

155. *See id.* at 1384; *see also* *Green v. State Bar*, 27 F.3d 1083 (5th Cir. 1994) (granting *Parker* immunity to state committee members' unauthorized practice of law in the face of allegations of a conspiracy to exclude lay claims adjusters from competing with lawyers); *Lender's Service, Inc. v. Dayton Bar Ass'n*, 758 F. Supp. 429, 434 (S.D. Ohio 1991) (holding that even when the conduct of an unauthorized practice committee cannot be considered conduct of the state supreme court, the committee's activity can be "clearly articulated and affirmatively expressed as state policy" and even if incorrect as a matter of law, committee members have *Parker* protection against antitrust liability); *Turner v. ABA*, 407 F. Supp. 451 (N.D. Tex. 1975) (rejecting a claim that litigants have the right to be represented by unlicensed lay counsel); *cf.* *Virginia State*

The final major application¹⁵⁶ of *Parker* immunity has been to questions of law school accreditation. *Massachusetts School of Law at Andover, Inc. v. ABA*¹⁵⁷ was brought by a law school that proposed to provide "low-cost but high quality legal education and attracting mid-life, working class, and minority students."¹⁵⁸ To keep its tuition around \$9000 per year when that at other private law schools was much higher, Massachusetts School of Law ("MSL") proposed to deliver an education that failed to comply with some ABA accreditation standards.¹⁵⁹ In particular, it did not plan to use many full-time faculty; it planned relatively high student-faculty ratios; and it refused to use the LSAT or some other validated admission test.¹⁶⁰ The school thus did not receive ABA accreditation and, allegedly as a result, it had trouble attracting students, so it sued the ABA and numerous individual defendants, alleging a conspiracy to keep the cost of legal education high.¹⁶¹

The district court held the defendants were entitled to *Parker* immunity,¹⁶² the Court of Appeals affirmed,¹⁶³ and the Supreme Court denied certiorari.¹⁶⁴ The Third Circuit held that non-accreditation is only significant insofar as a state supreme court makes an independent judgment that it will require graduation from an accredited law school a condition of admission to the bar.¹⁶⁵ Further, even though the ABA's collection of faculty salary data and criticism of low salaries were "price affecting," neither was shown to have determined MSL's lack of accreditation.¹⁶⁶ Finally, even if ABA accreditation is "prestigious" and thus desirable, a loss of prestige arising from refusal

Bar v. Surety Title Ins. Agency, Inc., 571 F.2d 205 (4th Cir. 1978) (allowing the *Parker* exemption to the Virginia State Bar unauthorized practice of law committee).

156. There are other isolated examples in which *Parker* immunity disposed of a claim against lawyers. See, e.g., *Benton, Benton & Benton v. Louisiana Public Facilities Auth.*, 897 F.2d 198 (5th Cir. 1990) (holding that a state agency was immune to a claim that its selection of bond counsel was arbitrary); *Guralnick v. Supreme Court*, 747 F. Supp. 1109 (D.N.J. 1990) (holding that a state's mandatory fee arbitration system was immune from antitrust challenge); *In re Rhode Island Bar Ass'n*, 374 A.2d 802 (R.I. 1977) (holding that the creation of a unified bar with mandatory dues does not violate antitrust law).

157. 107 F.3d 1026 (3d Cir. 1997). For a good analysis of this and related cases involving legal education and the ABA generally, see Peter James Kolovos, Note, *Antitrust Law and Nonprofit Organizations: The Law School Accreditation Case*, 71 N.Y.U. L. Rev. 689 (1996).

158. 107 F.3d at 1029.

159. See *id.*

160. See *id.* at 1031.

161. See *id.* at 1031-32.

162. See *Massachusetts School of Law at Andover v. ABA*, 937 F. Supp. 435, 435-46 (E.D. Pa. 1996), *aff'd*, 107 F.3d 1026 (3d Cir.), *cert. denied*, 118 S. Ct. 264 (1997).

163. See *Massachusetts School of Law*, 107 F.3d at 1044.

164. See *Massachusetts School of Law*, 118 S. Ct. 264, 265 (1997).

165. See *Massachusetts School of Law*, 107 F.3d at 1036.

166. See *id.* at 1039-40.

to approve a product or service "does not alone make out an antitrust claim."¹⁶⁷

V. CASES IN WHICH AN ANTITRUST VIOLATION BY LAWYERS HAS BEEN FOUND

Nevertheless, the bar has not dodged every bullet. First, as acknowledged in *Massachusetts School of Law*, for many years the ABA has collected data on the salaries of law professors, deans, librarians, and administrators, as well as expenditures on specific law school functions.¹⁶⁸ These have been used by law schools to explain to university administrations why increases in law school funding are necessary if the law school is to remain competitive. When the United States Department of Justice asserted that such an information exchange could facilitate more rapid increases in the cost of education than would otherwise occur, it filed suit against the ABA to stop it.¹⁶⁹ Embroiled in the *MSL* litigation, the ABA quickly capitulated on this and other matters even though, as the result in *MSL* suggests,¹⁷⁰ the ABA ultimately might have prevailed.

Next, antitrust issues have arisen in connection with the breakup of law firms. In *Blackburn v. Sweeney*,¹⁷¹ for example, four lawyers who had composed a personal injury firm decided to become two separate firms. Advertising was the source of their cases, and in dividing their assets, they agreed not to compete with each other in advertising for clients.¹⁷² Thus, Blackburn and Green agreed not to advertise in Sweeney and Pfeifer's agreed part of the state, and their former partners returned the favor.¹⁷³ When Blackburn and Green wanted out of the agreement, however, they asserted that it violated section 1 of the Sherman Act as an illegal division of markets.¹⁷⁴ The district court dismissed the complaint, but the Seventh Circuit agreed with the plaintiffs.¹⁷⁵ While the agreement might be considered ancillary to a valid agreement to dissolve the partnership, it was not necessary to make the dissolution occur and its infinite duration rendered it unrea-

167. *Id.* at 1038 (citations omitted); see also *Feldman v. Gardner*, 661 F.2d 1295, 1304-08 (D.C. Cir. 1981) (stating that the D.C. Court of Appeals is entitled to *Parker* immunity for requiring graduation from an accredited school for admission to the bar); *Brandt v. ABA*, No. Civ.A. 3:96-CV-2606D, 1997 WL 279762 (N.D. Tex. 1997) (granting ABA officials immunity from suit for failure to accredit Texas Wesleyan University School of Law); *Zavaletta v. ABA*, 721 F. Supp. 96 (E.D. Va. 1989) (allowing immunity for decisions relating to CBN University School of Law).

168. See *Massachusetts School of Law*, 107 F.3d at 1033.

169. See *id.* at 1032.

170. See *supra* text accompanying notes 165-67.

171. 53 F.3d 825 (7th Cir. 1995).

172. See *id.* at 827.

173. See *id.*

174. See *id.*

175. See *id.* at 827, 830.

sonable.¹⁷⁶ "The restriction on advertising is thus naked, not ancillary, and per se illegal to boot."¹⁷⁷

By far the most dramatic application of antitrust prohibitions to lawyers, however, came in *FTC v. Superior Court Trial Lawyers Ass'n*.¹⁷⁸ A group of about 100 lawyers in the District of Columbia had made a career of accepting appointments to represent indigent defendants in the criminal courts. Compensation for this work was capped by law at thirty dollars per hour in court and twenty dollars per hour for out-of-court time.¹⁷⁹ By 1982, these lawyers, supported by other bar groups, sought an increase in rates to at least thirty-five dollars per hour, but the increase did not pass because the Mayor said the city could not pay for it.¹⁸⁰ The lawyers in the Association then voted to "strike."¹⁸¹ They simply did not show up to receive new appointments at the usual times and within ten days the D.C. criminal justice system "was on the brink of collapse."¹⁸² At that point, the Mayor found the money, the city council promised to pay thirty-five dollars per hour, and the lawyers went back to taking assignments.¹⁸³

The antitrust case, however, was only beginning. Federal Trade Commissioners learned about the strike through the news media where it had been covered extensively. They voted to accuse strike organizers of a "conspiracy to fix prices and conduct a [group] boycott," both violations of section 1 of the Sherman Act and section 5 of the FTC Act.¹⁸⁴ An Administrative Law Judge conducted a trial and concluded that, while the action was technically not protected as lobbying activity or other political action, everyone agreed the cause had been right and "there was no harm done."¹⁸⁵ The Commissioners dis-

176. *See id.* at 828.

177. *Id.* at 829. The Court declined, however, to find treble damages an appropriate remedy. *See id.* The plaintiffs and defendants were equally responsible for the violation, and neither suffered more than the other from the rule. *See id.* at 829-30. Thus, an injunction against enforcement of the restriction was sufficient to make the parties whole. *See id.* at 830; cf. *Howard v. Babcock*, 863 P.2d 150, 160 (Cal. 1993) (holding that a restrictive covenant does not violate California Rules of Professional Conduct); *Whiteside v. Griffis & Griffis, P.C.*, 902 S.W.2d 739, 746 (Tex. App. 1995) (stating that the division of markets violates the Texas Rules of Professional Conduct but is not per se unreasonable under Texas state antitrust law).

178. 493 U.S. 411 (1990).

179. The average income earned by a lawyer working on such cases full time was about \$20,000 per year. *See Superior Court Trial Lawyers Ass'n v. FTC*, 856 F.2d 226, 228 (D.C. Cir. 1988).

180. *See Superior Trial Lawyers Ass'n*, 493 U.S. at 415-16.

181. *Id.* at 416.

182. *Id.* at 418 (quoting *Superior Court Trial Lawyers Ass'n*, 107 F.T.C. 510, 544 (1986)).

183. *See id.*

184. *See id.* at 418.

185. *Id.* at 419 (quoting *Superior Court Trial Lawyers Ass'n*, 107 F.T.C. 510, 561 (1986)). One of the cases the strikers had cited was *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), a leading civil rights case upholding the constitutional right of African American shoppers to boycott white merchants. Consistent with *FTC v.*

agreed, however, and entered a cease and desist order based on the ALJ's factual findings.¹⁸⁶

In his opinion for the Court of Appeals for the District of Columbia Circuit,¹⁸⁷ Judge Douglas Ginsburg¹⁸⁸ offered a middle ground. The antitrust significance of the strike depends on the market power of the strikers, he said.¹⁸⁹ If they have market power, then regardless of their motives, their conduct is per se illegal.¹⁹⁰ If they do not have such power, however, then their political success was due to their lobbying acumen, and lobbying for government favors is not an antitrust offense.¹⁹¹ Thus, the court sent the matter back to the FTC for a determination of the market power issue.¹⁹²

Instead, the FTC took the matter to the Supreme Court, which ruled that the strike was per se illegal regardless of the defendants' motives or market power.

We may assume that preboycott rates were unreasonably low, and that the increase has produced better legal representation for indigent defendants. . . . [But t]hese assumptions do not control the case, for it is not our task to pass upon the social utility or political wisdom of price-fixing agreements.

. . . The horizontal arrangement among these competitors was unquestionably a "naked restraint" on price and output.¹⁹³

The Court seemed troubled by the possibility that tolerating these lawyer-strikers would encourage an endless line of government contractors to employ similar techniques. Justice Stevens quoted *Allied Tube & Conduit Corp. v. Indian Head, Inc.*:¹⁹⁴

If all such conduct were immunized then, for example, competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports. . . . Firms could claim immunity for boycotts or horizontal output restrictions on the ground

Indiana Federation of Dentists, discussed *supra* at text accompanying notes 111-16, the ALJ also found that the lawyers were not a labor union entitled to protection under section 6 of the Clayton Act. See *Superior Court Trial Lawyers Ass'n*, 856 F.2d at 230 n.6.

186. See *Superior Court Trial Lawyers Ass'n*, 107 F.T.C. at 544.

187. *Superior Court Trial Lawyers Ass'n v. FTC*, 856 F.2d 226 (D.C. Cir. 1988), *rev'd in part*, 493 U.S. 411 (1990).

188. Judge Ginsburg is himself an antitrust expert. Prior to his appointment to the bench, he headed the Antitrust Division at the U.S. Department of Justice.

189. See *Superior Court Trial Lawyers Ass'n*, 856 F.2d at 252-53.

190. See *id.* at 249 (citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940)). For a discussion of *Socony-Vacuum*, see *supra* text accompanying notes 39-42.

191. See *Superior Court Trial Lawyers Ass'n*, 856 F.2d at 241-42 (citing *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961)). For a discussion of *Eastern R.R. Presidents Conference*, see *supra* note 56.

192. See *Superior Court Trial Lawyers Ass'n*, 856 F.2d at 253.

193. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 421-23 (1989).

194. 486 U.S. 492 (1988).

that they are intended to dramatize the plight of their industry and spur legislative action.¹⁹⁵

VI. IMPLICATION OF ANTITRUST EXPOSURE ON SOME ISSUES LAWYERS FACE

Antitrust cases involving the legal profession make clear that lawyers are no longer immune from liability, and *Goldfarb* and *Superior Court Trial Lawyers* show the exposure can have consequences. On the other hand, the practical impact of antitrust exposure has been quite low. Most concerted activity by lawyers is coordinated through rules adopted by their state supreme courts, and so far, that regulation has received the benefit of *Parker* state action immunity. In the future, lawyers who feel the heat of the antitrust laws are likely to be those who ignore the benefits of having their conduct judicially mandated. At least three issues facing lawyers today, however, illustrate that they must at least think about antitrust questions as they engage in rulemaking or otherwise assert their influence on evolving events.

First, for many years, specialty certification was done by official groups within the organized bar, if at all.¹⁹⁶ Becoming a specialist was not identical to receiving one's original license to practice law, but the process could have been expected to receive similar antitrust immunity. Since the Supreme Court decision in *Peel v. Attorney Registration & Disciplinary Commission of Illinois*,¹⁹⁷ however, specialty certification may now be granted by unofficial groups who are unlikely to have such immunity. As doctors have learned,¹⁹⁸ a certifying body that does not have clearly articulated, relevant criteria, applied on a consistent basis, runs the risk of being accused of a group boycott or other exclusionary conduct.¹⁹⁹

195. *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 425 (quoting *Allied Tube*, 486 U.S. at 503). Justices Brennan and Marshall dissented in part, concerned that the Court's holding risked turning boycotts by racial minorities and others with no market power into per se antitrust violations. See *id.* at 447-51 (Brennan, J., dissenting). Indeed, by the time of this decision, group boycotts were no longer even per se illegal. See *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985); *supra* note 93. Justice Blackmun dissented in part, on the ground that the 100 lawyers charged here obviously had no economic market power because the D.C. courts remained free to appoint criminal defense counsel from the bar at large. See 493 U.S. at 453-54 (Blackmun, J., dissenting).

196. See any version of Rule 7.4 of the ABA Model Rules of Professional Conduct prior to its amendment in 1992. For examples of some of the official accrediting systems for specialists, see Richard F. Zehnle, *Specialization in the Legal Profession* (1975).

197. 496 U.S. 91 (1990).

198. See *Patrick v. Burget*, 486 U.S. 94 (1988); *supra* text accompanying notes 119-21.

199. The principle might even extend to organizations like the American Law Institute or the Association of American Law Schools, where membership gives prestige but no additional legal rights. *But see* *Massachusetts School of Law at Andover, Inc. v. ABA*, 107 F.3d 1026, 1038-39 (3d Cir. 1997) (holding that the ABA was immune to

Second, law schools are important profit centers for most private universities. One of the important functions of the ABA Section on Legal Education and Admission to the Bar has been its threat to withhold accreditation from law schools whose universities do not apply a substantial majority of law student tuition to funding the law school. As discussed earlier, the Justice Department challenged the ABA's collection of salary and other data on the ground that it tended to raise professors' salaries, and the ABA backed down.²⁰⁰ The long-term effect of the consent decree is still uncertain,²⁰¹ but the impact of the loss of antitrust immunity may continue to be felt in law school budgets.

Finally, the looming question facing the legal profession in the near future is the effort by multi-disciplinary firms—primarily large accounting firms—to deliver services long considered to be the practice of law. Such services might include assisting the planning of mergers, for example. The firm's accountant-partners might verify the financial information, while the firm's lawyer-partners prepare the necessary documents and obtain regulatory approvals.

To date, the reaction of lawyers to this development has been intensely negative,²⁰² in spite of the fact the ABA itself has authorized law firms to hire non-lawyers to deliver "law-related services."²⁰³ Response to this issue will be an important test of the organized bar's ability to follow the route to antitrust safety. Here, as elsewhere, if opposition to the development is confined to invocation of generally applicable rules against unauthorized practice of law or practice with non-lawyers, adopted by the authority that regulates a state's lawyers, antitrust liability should not be a serious concern.²⁰⁴

CONCLUSION

This Article began by noting a possible interplay between antitrust exposure and today's tendency to see law as a business. Psychologi-

antitrust prosecution where its conduct did not constitute a direct attack on the plaintiff); *supra* text accompanying notes 148-62 (discussing *Massachusetts School of Law*).

200. The consent decree to which the ABA agreed is published at 60 Fed. Reg. 39,421 (1995).

201. One might speculate about whether doubt will be cast, for example, on the ABA prohibition of law students receiving pay for practice externships for which the students receive academic credit. See American Bar Association Standards for Approval of Law Schools, Interpretation 305-1 (1996); see also *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998) (holding that the NCAA rule restricting what universities may pay part-time assistant coaches violates antitrust law).

202. Incoming ABA President Philip Anderson has appointed a Commission to study how lawyers should respond to this development. See John Gibeaut, *Squeeze Play*, A.B.A. J., Feb. 1998, at 42, 42 ("Dallas lawyer William D. Elliott sees nothing short of a holy war on the horizon.").

203. See Model Rules of Professional Conduct Rule 5.7 (1992).

204. See *Lawline v. ABA*, 956 F.2d 1378 (7th Cir. 1992); *supra* text accompanying notes 150-58 (discussing *Lawline*).

cally, that link may be valid, but this Article has shown that, if anything, lawyers remain able to obtain regulatory protection for most of their anticompetitive behavior. If the move of lawyers toward “business” is undesirable—not by any means a matter of consensus—the antitrust laws turn out to be neither the reason nor a valid excuse.

Notes & Observations